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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

STATE OF NEW MEXICO, COMPLAINANT,

vs.

STATE OF TEXAS.

MOTION FOR LEAVE TO INTRODUCE ADDITIONAL TESTIMONY, WITH NOTICE AND PROOF OF SERVICE.

FRANK W. CLANCY,
Counsel for Complainant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

NOTICE OF HEARING ON MOTION.

To Hon. W. A. Keeling, Austin, Texas, Attorney General of the State of Texas, and W. W. Turney, El Paso, Texas, Special Counsel, Solicitors for Defendant, The State of Texas:

Please take notice that on Monday, February 11, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion to permit the introduction of certain additional testimony to correct and supplement the testimony of R. J. Owen, who testified upon the original hearing of this case as a witness for the State of Texas, a copy of

which said motion is herewith served on you, will be submitted to the Honorable Judges of the Supreme Court of the United States, at the court-room, in the Capitol, at the city of Washington, in the District of Columbia, for decision thereon.

You will also please take notice that hereto annexed and served herewith is a blue-print copy of the map referred to in said motion and the affidavit attached thereto.

Dated at Santa Fe, State of New Mexico, this 8th day of January, A. D. 1924.

FRANK W. CLANCY,
Santa Fe, New Mexico,
Counsel for the State of New Mexico.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

AFFIDAVIT OF SERVICE OF MOTION BY MAIL.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

FRANK W. CLANCY, being first duly sworn, on oath says that he is the solicitor for the plaintiff, The State of New Mexico, in the within-entitled cause; that he served a copy of the foregoing and attached notice of hearing, together with a copy of the motion to be allowed to introduce certain additional testimony and a copy of the blue-print and map referred to therein, upon the Hon. W. A. Keeling, Attorney General of the State of Texas, solicitor for the defendant, upon the 8th day of January, A. D. 1924, by depositing true copies of the same in the postoffice at Santa Fe, New Mexico, securely enclosed in a duly sealed and stamped envelope and wrapper addressed to the Hon. W. A. Keeling, Attorney General of the State of Texas, at Austin, in the State of Texas, the same being the record address of the said Hon. W. A. Keeling, solicitor for the defendant; and affiant further states that in due course of mail from the city of Santa Fe, in the State of New Mexico, to the city of Austin, in

the State of Texas, the copies of said notice of hearing, motion, and map should reach the said Hon. W. A. Keeling on or before thirty (30) days prior to the date of the hearing upon said motion.

FRANK W. CLANCY.

Subscribed and sworn to before me this 8" day of January, 1924.

[SEAL.] JOHN J. KENNEY,
Notary Public.

My commission expires June 22, 1924.

[Endorsed:] In the Supreme Court of the United States. The State of New Mexico *vs.* The State of Texas. Notice of

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

Original, No. 3.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

MOTION FOR LEAVE TO INTRODUCE ADDITIONAL TESTIMONY.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the State of New Mexico, by its attorneys, and files this its motion to be allowed to introduce certain additional testimony to correct and supplement the testimony of R. J. Owen, who testified upon the original hearing of this case as a witness for the State of Texas, and as grounds for this motion the State of New Mexico respectfully represents to this Honorable Court:

FIRST. R. J. Owen was duly sworn as a witness in this cause and testified as such witness on behalf of the State of Texas, his testimony beginning on page 2625 of volume 5 of the transcript of the record in this cause, and there was introduced in evidence at the original hearing of this cause Defendant's Exhibit No. 65, as same appears in volume 6 of the transcript of the record, and being Map No. 3 of R. J. Owen. Said map shows, among other things, the line of a river which is designated "Rio Grande of 1905," and this

river line, according to the map, apparently extends from the 32d parallel down to the southern extremity of the land involved in this dispute, and the map apparently shows one continuous line for this river of 1905. However, the said witness, R. J. Owen, in his testimony as set out on pages 2628, 2652, 2654, 2655, 2671, and 2680 of the printed record, testified that he actually surveyed the "River of 1905" from a point directly west of the southwest corner of the Canutillo Grant extending north to the 32d parallel; and he also testifies that he actually surveyed the "River of 1905" below Piedras Paradas, but his testimony does not show that he actually surveyed the line of the "River of 1905" between the south boundary line of the Canutillo Grant extended and Piedras Paradas, and he further testifies that he does not claim that the line shown on the map between the south line of the Canutillo Grant and Piedras Paradas shows the location of the "River of 1905." The evidence, therefore, shows that the map prepared by R. J. Owen and known as "Defendant's Exhibit No. 65" does not show the location of the river of 1905 between the two points above mentioned.

The said R. J. Owen has, however, prepared a map which does show the true location of the river of 1905, and also the rivers of 1908 and 1909, between the south boundary line of the Canutillo Grant and Piedras Paradas. A copy of this map is attached to this motion and marked "Supplementary Map of R. J. Owen," and we have also attached to this motion the affidavit of the said R. J. Owen, which is marked "Supplementary Testimony of R. J. Owen." This map and this supplementary testimony of R. J. Owen shows that the true location of the Rio Grande in 1905 and in 1909 is shown on said map, copy of which accompanies this motion, and said supplementary testimony of R. J. Owen

shows that the river line as shown on "Defendant's Exhibit No. 65" between the south boundary line of the Canutillo Grant and Piedras Paradas is not a correct representation of the river line as it existed in 1905 and in 1908.

Your petitioner respectfully prays that it be allowed to introduce as a part of the evidence and as a part of the testimony in this case the map prepared by R. J. Owen, a copy of which is hereto attached, and also requests that it be allowed to introduce the testimony of R. J. Owen as detailed in the affidavit of the said Owen attached to this motion, so that "Defendant's Exhibit No. 65," heretofore introduced in this cause, may be supplemented, explained, and corrected to conform with the actual conditions upon the ground and the actual facts, and so that this Honorable Court may in passing upon this cause be fully advised as to the actual conditions in so far as they may be affected by the testimony sought to be introduced by this motion.

Respectfully submitted,

FRANK W. CLANCY,
Attorney for the State of New Mexico.

THE STATE OF TEXAS,
County of El Paso:

I, R. J. OWEN, being duly sworn, state upon oath that I am the same R. J. Owen, known as Richard J. Owen, who testified as a witness on behalf of the State of Texas in the taking of the testimony in the case of the State of New Mexico against the State of Texas, now pending in the Supreme Court of the United States, and I am the same Richard J. Owen who, as shown on page 2625 of the transcript of the

record in said cause, took the witness stand in said cause on or about the 12th day of December, 1914, and I am the same R. J. Owen who prepared Texas Map Number 3, which was introduced in evidence in said cause and which is marked "Defendant's Exhibit No. 65," and I state upon oath that, as shown by the testimony given by me in said cause, particularly on pages 2628, 2652, and 2654, 2671, and 2680, I testified in said cause with reference to the position of the Rio Grande River in 1905, and I testified that the river line denoting said river of 1905, as shown on said map, was in accordance with my survey made on the ground beginning at a point directly west of the south line of the Canutillo Grant and extending northerly to the thirty-second parallel of latitude; and I also testified in said cause that I surveyed the river of 1905 and showed the said line on said map correctly, beginning at the point marked "Piedras Paradas" and extending down to the south end of said map, but I also testified that I did not claim that the river line against the foot-hills which is shown on said map between the south line of the Canutillo Grant and Piedras Paradas was the line of the river in 1905, and I now state, under oath, that said parallel lines bordering the foot-hills and which appear on the map to be a continuation of the 1905 river do not correctly show the position of the river in 1905 and thereafter as between the south line of the Canutillo Grant and Piedras Paradas, and I further state that there were indications on the ground of old river beds along near the line of the foot-hills on the west side of the valley, but from the appearance of said old river beds it was and is impossible to state whether or not the main channel of the river ever flowed over near the foot-hills, and it would be impossible to state whether the depressions now on the ground and which were on the ground

when I first became familiar with this territory were made by the main channel of the river, or whether such depressions were made by high water in flood time, or whether they were made by water flowing down from the foot-hills from rains, and it is impossible to state what caused said depressions, and between Piedras Paradas and the south line of the Canutillo Grant said depressions have never been as well defined or as regular or as continuous as they are to the north of the south line of the Canutillo Grant.

And I further state, upon oath, that I was familiar in 1905 with the location of the Rio Grande between the south line of the Canutillo Grant and Piedras Paradas, and was familiar with the line occupied by the river in 1905 at the time of trial of the boundary suit between Texas and New Mexico, and am still familiar with the position occupied by said river in 1905, and I have prepared a map, which is attached hereto and which is signed by me, or rather the blue print of said map is attached hereto, and said blue print, which is attached hereto, correctly shows the position occupied by the Rio Grande River in 1905, and the river line of 1905 is on said map named, and is further distinguished by the shadings as shown on said map.

I further state, upon oath, that about 1905 the Rio Grande River, by an avulsive change, changed its location from the line marked "Rio Grande 1905" to a position such as shown on Defendant's "Exhibit No. 65," with the exception that up until about 1909 the river continued to run around the channel occupied in 1905, beginning at about the intersection of the west line of survey No. 156 with said river channel and continuing on around to the east of the Country Club property and continuing on around back across what is marked "Survey No. 156" and what is marked as "Sur-

vey No. 157" to the channel now occupied by the Rio Grande River as shown on said map, and subsequently, between 1909 and 1911, or at approximately that date, by an avulsive change, the river left its channel which passed to the east and south of the Country Club building and went over and occupied a position approximately such as is shown on the map as the present channel of the Rio Grande River, and the position of the Rio Grande in 1905 and the position of the river around the Country Club in 1909 is indicated on the map as the river line of 1905, and on the ground said former channel may be plainly seen at this time for practically the entire extent of the course of said river of 1905, except where land has been graded, leveled, and placed in cultivation, and even in those places the position of the river of 1905 may be distinguished on the ground for practically the whole distance. On the map the line of the river of 1905 is clearly indicated by distinctive shadings of the lines and by words designating said river line.

I further state, on oath, that said map shows certain Texas surveys as extending across the line of the river of 1905. Said lines are not placed upon said map as true indications of the positions that said surveys should occupy, but are placed upon said map to show where the Texas claimants are claiming that said Texas surveys extend; and I am familiar with the field-notes of said Texas surveys and know that there is not sufficient land in the valley to include said Texas surveys between the west boundary of the valley and the Canutillo Grant lines.

And I further state, on oath, that between the south boundary line of the Canutillo Grant and Piedras Paradas there are no indications on the ground at the present time of any river channel along the line indicated on the map as

the river of 1852, being the position claimed for that river by the State of Texas; and there are no old channels or depressions along the line indicated as the river of 1852 as claimed by Texas, the indications on the ground being that the river, if in 1852 it occupied the position claimed by Texas, then it changed its position to the position occupied by it in 1905, within the territory above indicated, by gradual changes through accretion and not by an avulsive change, and that in said territory between the south line of the Canutillo Grant and Piedras Paradas the only avulsive changes which I am able to testify to are the changes which occurred subsequent to 1905, as indicated above.

From my observations on the ground during the period beginning at about 1900 and extending down to date, it is my opinion that if the river occupied in 1852 the position claimed by Texas, as shown on the map, then it changed its position to the position which it occupied in 1905 by accretion and not by avulsion.

I further state, upon oath, that from the point where the shaded line showing the river of 1905 comes to an end at a point where it returns to the Rio Grande of the present date, and being the southern extremity of the shaded line, down to Piedras Paradas, there is no indication of an avulsive change, but the river has at all times apparently continued to run in approximately the same position as it now occupies, and if it occupied the position in 1852 as claimed by Texas and as shown on said map, then its present location has been reached apparently by accretion, and said map shows the position which the river occupied in 1852 as claimed by Texas, and also shows the position occupied by the Rio Grande in 1923, and on said map the line which is designated "Rio Grande in 1852" represents the line of the river

in 1852, as such line is claimed by Texas and by its engineers in this suit.

RICHARD J. OWEN.
R. J. OWEN.

Sworn to and subscribed before me this 26th day of November, 1923.

[SEAL.] THORNTON HARDIE,
Notary Public in and for El Paso County, Texas.

THE STATE OF TEXAS,
County of El Paso:

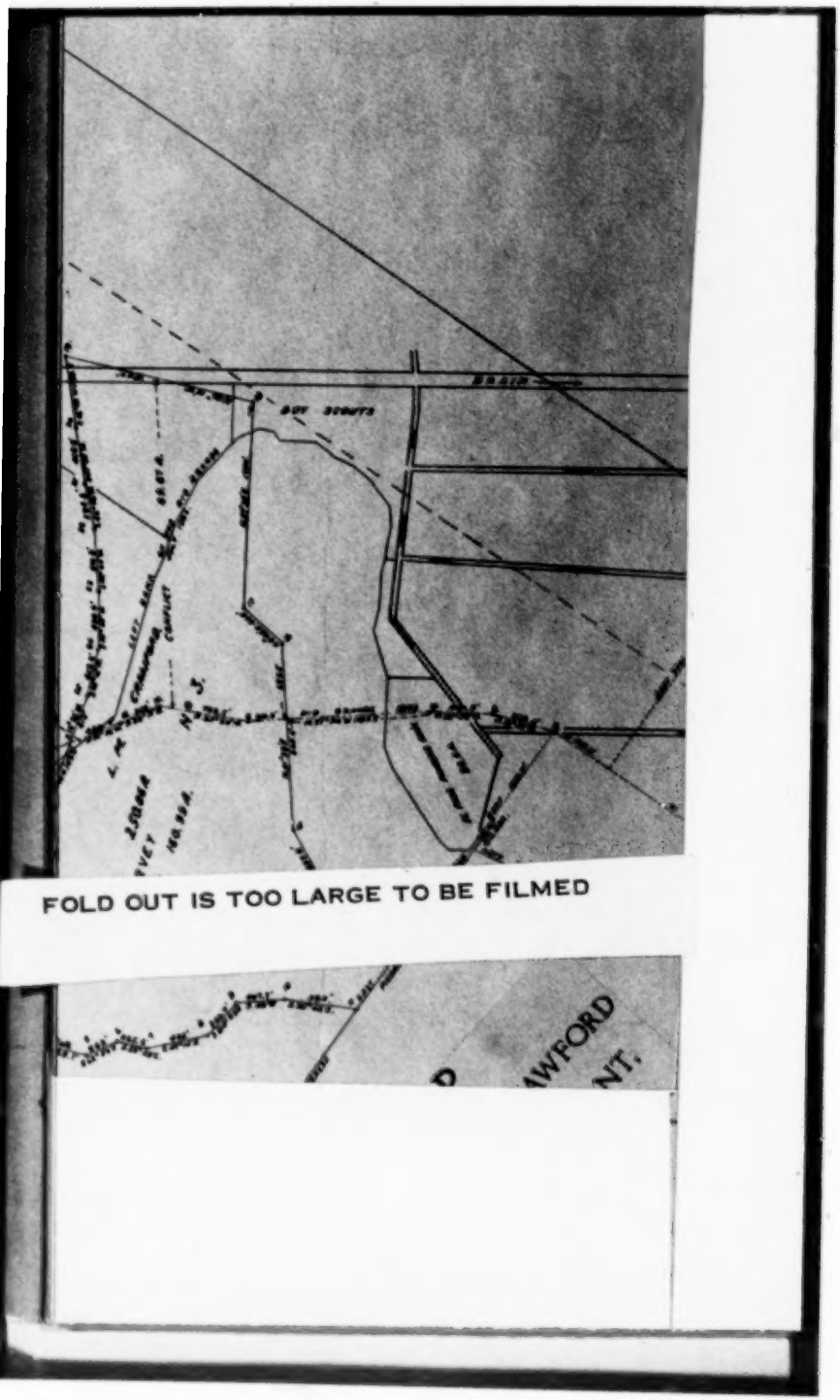
Before me, the undersigned authority, a notary public in and for El Paso County, Texas, on this day personally appeared Richard J. Owen, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 26th day of November, A. D. 1923.

[SEAL.] THORNTON HARDIE,
Notary Public in and for El Paso County, Texas.

[Endorsed:] In the Supreme Court of the United States. Original, No. 3. The State of New Mexico *vs.* The State of Texas. Motion by the State of New Mexico to be allowed to correct certain testimony and to introduce certain additional testimony.

[Endorsed:] Supreme Court U. S., October term, 1923. Term No. 3, original. The State of New Mexico, complainant, *vs.* The State of Texas. Motion of complainant to be allowed to correct certain testimony and introduce certain additional testimony. Filed Jan. 12, 1924.



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